Supreme Court of the United States

OCTOBER TERM, ~~1967~~ 1965

No. ~~646~~ 17

UNITED STATES, PETITIONER

vs.

RAY F. SPEERS, TRUSTEE IN BANKRUPTCY OF THE KURTZ ROOFING COMPANY, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

	Original	Print
Proceedings in the United States Court of Appeals for the Sixth Circuit		
Appendix B to brief for appellant consisting of portions of the record from United States District Court for the Northern District of Ohio, Western Division	A	1
Docket entries	1	2
Proceedings before the Referees in Bankruptcy	2	3
Proof of claim of the United States	2	3
Notice of federal tax lien	3	4

	Original	Print
Appendix B to brief for appellant consisting of portions of the record from United States District Court for the Northern District of Ohio, Western Division—Continued		
Proceedings before the Referees in Bankruptcy—Continued		
Notice of final meeting of creditors and hearing on account of trustee	7	8
Answer of United States to show cause and cross petition	9	10
Order of referee, dated June 12, 1962	10	11
Hearing on answer and cross petition of the United States	12	13
Colloquy between Court and counsel	12	13
Testimony of Robert H. Gill—direct	14	15
Colloquy between Court and counsel	22	22
Exhibits 1 & 2—Certificates of Assessments and Payments, Form 899	23	23
Petition for review	27	27
Referee's certificate on petition for review	28	28
The evidence	29	29
The issues presented	30	30
Findings of fact	31	31
Conclusions of law	34	33
Memorandum	35	35
Order dismissing petition for review, March 20, 1963	43	42
Notice of appeal	44	43
Minute entry of argument and submission (omitted in printing)	45	43
Opinion, O'Sullivan, J.	47	44
Judgment	53	50
Clerk's certificate (omitted in printing)	55	50
Order allowing certiorari	57	51

[fol. A]

No. 15,405

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

IN THE MATTER OF:

THE KURTZ ROOFING COMPANY,
f/d/b/a KURTZ SUPPLY COMPANY,
Bankrupt.

UNITED STATES OF AMERICA, APPELLANT

v.

RAY F. SPEERS, Trustee in Bankruptcy, APPELLEE

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

APPENDIX B TO BRIEF FOR APPELLANT—filed August 28, 1963

---

* * * *

[File Endorsement Omitted]

[fol. 1] In Bankruptcy No. 27,743

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION.

IN THE MATTER OF:

THE KURTZ ROOFING COMPANY,
f/d/b/a KURTZ SUPPLY COMPANY,
Bankrupt.

DOCKET ENTRIES.

6/20/60. Voluntary Petition and schedules filed in triplicate and referred to Referee.

6/20/60. Two copies of petition and schedule to Referee.

12/11/62. Certificate of Referee on Petition for Review of Order entered June 12, 1962 filed.

12/11/62. Copies of Certificate and notice to Spears, Buckingham, Gosline, Britz, Sowartz and District Director of Internal Revenue.

12/13/62. Stipulation extending time for District Director of Internal Revenue to file brief to 1-2-63 approved and filed. FLK.

1/2/63. Brief on behalf of the United States of America in support of Petition for Review, filed.

1/8/63. Stipulation extending time for Trustee to file brief opposing Petition for Review to Feb. 4, 1963, filed. Notice waived. FLK.

2/1/63. Brief of Trustee in Bankruptcy opposing Petition for Review, filed. Mailed 1/31/63.

3/20/63. Order dismissing Petition for Review, adopting and confirming the Findings and Conclusions of Referee, and confirming Order of Referee, filed and entered. FLK-18. Copies to: Frank Buckingham, Robert B. Gosline, Harland M. Britz, and Buckley D. Sowarts, Internal Rev. Service, Cleveland, Ohio; and T. Kenneth Mattimoe, Referee.

[fol. 2] 4/17/63. Notice of Appeal by United States of America, filed. Copies to: Frank Buckingham, Robert B. Gosline, Ray F. Spears and Referee T. Kenneth Mattimoe.

BEFORE THE REFEREES IN BANKRUPTCY

PROOF OF CLAIM OF THE UNITED STATES.—Filed November 16, 1960

The undersigned officer of the Internal Revenue Service, a duly authorized agent of the United States in this behalf, being duly sworn, deposes and says that:

1. The Kurtz Roofing Co. is justly and truly indebted to the United States in the sum of $21,633.69 with interest thereon as hereinafter stated;

2. The said debt is for taxes due under the internal revenue laws of the United States as follows:

Kind of Tax and Period	*Amount Due*	*Account No.*	*Date Tax Lien Arose*
WFT 3-31-59 including assessed Int.	$3,792.42	60 5 167484	6-3-60
Penalty	888.86		
Accrued Int. to 1-20-61	167.95		
WFT 6-30-59 including assessed Int.	5,585.82	60 5 167487	6-3-60
Penalty	1,328.08		
Accrued Int. to 1-20-61	250.94		
WFT 9-30-59 including assessed Int.	4,770.84	60 5 167486	6-3-60
Penalty	1,150.73		
Accrued Int. to 1-20-61	217.43		
FUTA 1959	470.56	60 9 880038	9-30-60
WFT 12-31-59	2,474.43	60 9 165589	9-30-60
WFT 3-31-60	535.63		

Plus additional interest @ 6% per annum on $16,838.38 from 1-21-60 to date of payment.

3. No part of said debt has been paid and the same is now due and payable at the Office of the District Director of Internal Revenue;

4. There are no set-offs or counterclaims to said debt; [fol. 3] 5. Except for the statutory tax liens which arose on the dates above stated, the United States does not hold, to the deponent's knowledge or belief, any security or securities for said debt;

6. No note or other negotiable instrument has been received for said debt or any part thereof, nor has any judgment been rendered with respect to said debt; and

7. Said debt has priority and must be paid in full in advance of distribution to creditors as and to the extent provided by law:

IN BANKRUPTCY ACT PROCEEDINGS see Sections 64, 77e, 199, 337(2), 455, and 659 of the Bankruptcy Act (11 U. S. C. 104, 205(e), 599, 737(2), 855, and 1059).

IN OTHER PROCEEDINGS see Section 3466 of the Revised Statutes (31 U. S. C. 191). Also, attention is invited to Section 3467 (31 U. S. C. 192) with respect to the personal liability of any executor, administrator, or other person who fails to pay the claims of the United States in accordance with their priority.

ROBERT H. GILL,
Chief Special Procedures,
Office of the District Director
of Internal Revenue,
P. O. Box 6902,
Cleveland, Ohio.

BEFORE THE REFEREES IN BANKRUPTCY

NOTICE OF FEDERAL TAX LIEN.—Filed February 9, 1961

Pursuant to the provisions of Sections 6321, 6322, and 6323 of the Internal Revenue Code of 1954, notice is hereby given that there have been assessed under the Internal Revenue laws of the United States against the following-named taxpayer, taxes (including interest and penalties) which after demand for payment thereof re-

main unpaid, and that by virtue of the above-mentioned [fol. 4] statutes the amount of said taxes, together with penalties, interest, and costs that may accrue in addition thereto, is a lien in favor of the United States upon all property and rights to property belonging to said taxpayer, to wit:

Name of Taxpayer—Kurtz Roofing Co., Inc.
Residence or Place of Business—305-307 W. Water St. Sandusky, Ohio

Nature of Tax	*Account No.*	*Year or Taxable Period*	*Assessment Date*	*Amount of Assessment*
WFT	60 5 167484	3/31/59	6/3/60	$4681.28
WFT	60 5 167487	6/30/59	6/3/60	6913.90
WFT	60 5 167486	9/30/59	6/3/60	5921.57
WFT	60 11 290053	12/31/59 DRP	11/30/60	41.23
WFT	60 9 165589	12/31/59	9/30/60	3191.42
WFT	60 9 165588	3/31/60	9/30/60	682.93
FUTA	60 9 880038	1959	9/30/60	606.91
			TOTAL	$22,039.24

WITNESS my hand at Cleveland, Ohio, on this 8th day of February, 1961.

MELVIN J. BURTON,
District Director Internal Revenue,

By (*Signature*) JOHN B. TAGGART,
Acting Group Supervisor.

INTERNAL REVENUE CODE OF 1954

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

[fol. 5] SEC. 6322. PERIOD OF LIEN.

Unless another date is specificaly fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) Under State or Territorial Laws.—In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

(2) With Clerk of District Court.—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice; or

(3) With Clerk of District Court for District of Columbia.—In the office of the clerk of the United States District Court for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(b) *Form of Notice.*—If the notice filed pursuant to subsection (a) (1) is in such form as would be valid if filed with the clerk of the United States district court pursuant to subsection (a) (2), such notice shall be valid notwithstanding any law of the State or Territory regarding the form or content of a notice of lien.

(c) *Exception in Case of Securities.*—

(1) Exception.—Even though notice of a lien provided in section 6321 has been filed in the manner prescribed

[fol. 6] in subsection (a) of this section, the lien shall not be valid with respect to a security, as defined in paragraph (2) of this subsection, as against any mortgagee, pledgee, or purchaser of such security, for an adequate and full consideration in money or money's worth, if at the time of such mortgage, pledge, or purchase such mortgagee, pledgee, or purchaser is without notice or knowledge of the existence of such lien.

(2) Definition of Security.—As used in this subsection, the term "security" means any bond debenture, note, or certificate or other evidence of indebtedness, issued by any corporation (including one issued by a government or political subdivision thereof), with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing; negotiable instrument; or money.

(d) *Disclosure of Amount of Outstanding Lien.*—If a notice of lien has been filed under subsection (a), the Secretary or his delegate is authorized to provide by rules or regulations the extent to which, and the conditions under which, information as to the amount of the outstanding obligation secured by the lien may be disclosed.

SEC. 6325. RELEASE OF LIEN OR PARTIAL DISCHARGE OF PROPERTY.

(a) *Release of Lien.*—Subject to such rules or regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of release of any lien imposed with respect to any internal revenue tax if—

(1) Liability Satisfied or Unenforceable.—The Secretary or his delegate finds that the liability for the amount assessed, together with all interest in respect thereof, has been fully satisfied, has become legally unenforceable, or, in the case of the estate tax imposed by chapter 11 or the gift tax imposed by chapter 12, has been fully satisfied or provided for; or

[fol. 7] (2) Bond Accepted.—There is furnished to the Secretary or his delegate and accepted by him a bond that is conditioned upon the payment of the amount assessed, together with all interest in respect thereof, within the time prescribed by law (including any extension of such time), and that is in accordance with such requirements relating to terms, conditions, and form of the bond and sureties thereon, as may be specified by such rules or regulations.

BEFORE THE REFEREES IN BANKRUPTCY

NOTICE OF FINAL MEETING OF CREDITORS AND HEARING ON ACCOUNT OF TRUSTEE.—Filed February 16, 1962

Notice is hereby given that a final meeting of creditors of the above-named bankrupt will be held at Room 222, United States Court House in Toledo, Ohio, on March 5, 1962, at 10:00 o'clock A. M.

Creditors are advised that the following is a summary of the administration of the estate taken from the reports and accounts of the trustee and papers filed in these proceedings:

	Priority Claims	*Secured Claims*	*Unsecured Claims*
Debts scheduled	$21941.25	$1199.60	$26400.82
Claims filed & allowed	20806.16	1199.60	22697.98

The following amounts were realized from liquidation of assets:

From sale of personal property	$10365.55
From collection of accounts receivable	6023.86
From bank account	297.14
From cash surrender value of insurance	993.97
Total Receipts	$17680.52

There has been disbursed by the trustee for expenses the following:

[fol. 8]

Auctioneer's commissions & expenses	$ 956.03
Secured claims	1199.60
Use & occupancy	596.75
Storage expense	643.50
Bond premiums	160.00
Towing expense	231.62
Total Disbursements	$ 3787.50
Leaving a present balance on hand of	$13893.02

Property was abandoned as having no equity or being worthless for administration as follows:

Description	*Appraised Value*	*Liens*
Accounts receivable as uncollectible		
26 foot boat	No value	$312.00

That at such meeting there will be heard and considered the following matters and any other matters proper to be considered thereat:

(1) Applications for allowance of fees and expenses as follows:

Trustee's fees	$ 518.61
Trustee's expenses	250.00
Attorney for Trustee fees	750.00
Attorney for Bankrupt fees	405.00
Receiver's fees	316.80

(2) Allowance and ordering payment of priority claims.

(3) Examination, passing upon and confirming the accounts of the trustee.

It is proposed to make recommendations and orders upon the aforesaid and to order the distribution of the balance in the hands of the trustee as follows:

C. B. Watkins, Clerk, Referee's salary & expense fund	$ 481.61
Ray F. Speers, Receiver's fees	316.80

[fol. 9]

Ray F. Speers, Trustee's fees	518.61
Frank Buckingham, Attorney for trustee fee & expenses	739.39
Richard Kruse, Attorney for Bankrupt fee & expenses	405.00
Ray F. Speers, Trustee's expenses	250.00
District Director of Internal Revenue, 53.48% of tax claim	9202.35
Bureau of Unemployment Compensation, 53.48% of tax claim	524.02
Treasurer of Erie County, 53.48% of tax claim	1308.55
Corporate-Franchise Tax Division, 53.48% of tax claim	92.69
Total	$13893.02

Creditors and other parties in interest are required to appear at the above place and time and show cause, if any they have why orders should not be made as above proposed.

NOTICE IS FURTHER GIVEN that a hearing on the trustee's account filed pursuant to the final distribution ordered herein will be held at Room 222, United States Court House in Toledo, Ohio on March 12, 1962 at 10:00 o'clock A. M.

Dated at Toledo, Ohio this 16th day of February, 1962.

FRANK C. KNIFFIN &
T. KENNETH MATTIMORE,
Referees in Bankruptcy.

BEFORE THE REFEREES IN BANKRUPTCY

ANSWER OF THE UNITED STATES TO ORDER TO SHOW CAUSE AND CROSS PETITION.—Filed March 2, 1962

NOW COMES the United States of America by the United States Attorney for the Northern District of Ohio, Western Division, and for answer to the order to show cause denies that the proposed order of distribution is proper and respectfully represents:

[fol. 10] THAT the District Director of Internal Revenue and the United States duly and timely filed its sworn claim for Internal Revenue taxes in this proceeding and said claim specifies the amounts of the statutory tax liens of the United States with the dates thereof;

THAT FURTHER, upon belief and information no objection has been filed in this case by any party as to the merits or amounts of said tax claim and statutory tax liens and no hearing has been held in this case as to the merits or amounts of said tax claims and statutory tax liens;

WHEREFORE, the United States of America prays that the interests of the United States be protected as far as its statutory liens and other rights are concerned.

MERLE M. MCCURDY,
United States Attorney,

By /s/ HARLAND M. BRITZ,
Asst. U. S. Atty.

BEFORE THE REFEREES IN BANKRUPTCY

ORDER OF REFEREE.—June 12, 1962

At Toledo, in this District, on the 12th day of June, 1962.

This matter came on to be heard on the Answer and Cross Petition of the United States of America filed in response to an Order to Show Cause why a proposed order of distribution should not be entered; and upon the evidence.

The responsive pleading alleged that the United States of America has valid liens on the funds in the hands of the trustee and that the proposed order was, therefore, erroneous.

The Court finds that due notice of the hearing was given by mail to all parties in interest.

[fol. 11] At the hearing there appeared on behalf of the United States of America, Buckley Sowards and Harland M. Britz.

The Court finds that the liens of the United States of America are based on three tax assessments made against the bankrupt by the District Director of Internal Revenue on the 3rd day of June 1960; that demands on the bankrupt to pay the assessments was made on the same date but that the assessments were never paid.

The Court finds that the amounts of the liens are as follows:

Under the first assessment, Account No. 60-5-167484: $3555.44 plus $236.98 interest to the date of the assessment.

Under the second assessment, Account No. 60-5-167487: $5312.34 plus $273.48 interest to the date of the assessment.

Under the third assessment, Account No. 60-5-167486: $4602.93 plus $167.91 interest to the date of the assessment.

The Court further finds that notices of the tax liens of the United States of America were not filed in the Office of the Recorder of Erie County, Ohio; the office designated by the State of Ohio for the filing of such notices.

The Court finds that the trustee, herein, had, on the 20th day of June 1960, the status of a judgment creditor of the bankrupt and that the liens of the United States of America are, therefore, invalid as against him.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the objections of the United States of America to the proposed order of distribution be, and they hereby are overruled; that the Answer and Cross Petition of the United States of America be, and it hereby is, dismissed and that the United States of America be, and it hereby is, forever barred from asserting any lien against the funds in the hands of the trustee.

T. KENNETH MATTIMOE,
Referee in Bankruptcy.

[fol. 12]

CC Ray F. Speers, Esq.
Trustee in Bankruptcy
502 Feick Building
Sandusky, Ohio

Frank Buskingham, Esq.
Attorney for Trustee
231 West Washington Row
Sandusky, Ohio.

Harland M. Britz, Esq.
Assistant United States Attorney
U. S. Court House
Toledo, Ohio.

Buckley Sowards, Esq.
Attorney at Law
1620 Williamson Building
215 Euclid Avenue
Cleveland 14, Ohio.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION.

HEARING ON ANSWER AND CROSS PETITION OF THE UNITED STATES OF AMERICA OF MAY 23, 1962.—Filed June 27, 1962

* * * *

COLLOQUY BETWEEN COURT AND COUNSEL

(2) The Court: The first matter for hearing is the Kurtz Supply Company, No. 27743. As I understand it, the Government filed an Answer and Cross Petition to the proposed order of distribution sent out by the Court.

Mr. Britz: I would like to introduce Your Honor to Buckley D. Sowards, of the Internal Revenue Service, who will be representing the United States of America in this proceeding.

The Court: Do you want to make a statement?

Mr. Sowards: First, we would like to stipulate that the bankruptcy files be made a part of the record, and a statement was made in our Answer to the Cross Petition,

[fol. 13] that we object to the distribution as set forth; and as I understand it, this hearing is being held to ascertain the facts behind our proof of claim, is that not correct?

The Court: I don't know whether your proof of claim would have too much to do with it. Of course, as I understand it, most of these orders with respect to the sale were made prior to the time here; that is, as I (3) understand the situation, there was an order of sale made on the petition of the trustee, and the Director of Internal Revenue or the United States was not made a party to that petition for sale. So that you never had an opportunity to file an answer or assert a lien against the property.

However, a proof of claim was filed, on which there is a date. There is a column which says, "Date Lien Arose," and under that there is a date. That is the only thing I know about the situation.

When the proposed order of distribution was filed and the Government filed its action, I understand the effect of that to be that they are opposing it because they say, "We have a lien on all this money, part of which you are distributing to other taxable authorities"; is that correct?

Mr. Sowards: That is correct.

The Court: So that the matter today would be the proof of whether or not you have a lien.

Mr. Sowards: At this time I would like to move that in the Kurtz case that the exhibits, the Statements of Assessments and the Payments Form be admitted in evidence under Rule 41.

The Court: Have you had them marked?

(4) Mr. Sowards: I have marked them in my own handwriting, your Honor (Handing the said papers to the Court.)

The Court: As a point of information, is this the paper that the Directors gets when the assessment is made? First of all, who makes the assessment?

Mr. Sowards: It is made in the District Director's Office, and this paper is a statement taken from the accounts and the records of the District Director which

[fol. 14] shows the dates the assessment was made, the date that notice and demand was made, and the third part is when the delinquent account is issued.

We are prepared with out witness, your Honor, to elicit testimony as to what is contained in this document.

The Court: But prior to that time could we have an understanding with respect to some of things on these two exhibits—with respect to, for instance, penalty and interest?

Perhaps you are not willing to agree on the interest, but I think you would agree that the penalty cannot be considered part of the lien, is that correct?

Mr. Sowards: We will agree to that.

(5) The Court: The interest you will not ask for?

Mr. Sowards: I do not believe so. Are those admitted in evidence, your Honor?

The Court: I would like to hear testimony on them.

Mr. Sowards: We will call Mr. Gill to the stand, please.

* * * *

(5) Thereupon, the Government called as a witness, ROBERT H. GILL, who, having been previously duly sworn by the Court, testified as follows:

EXAMINATION BY MR. SOWARDS.

Q. Will you state your full name, please? A. Robert H. Gill.

Q. Where are you employed? A. The District Director of Internal Revenue, Cleveland.

Q. What are your duties? A. I am Chief of Special Procedures Section, taking all (6) action on behalf of the District Director in insolvency proceedings.

Mr. Sowards: May I have Exhibit 1, your Honor?

Q. (By Mr. Sowards) Mr. Gill, I hand you what has been marked as Exhibit 1 and ask you to identify it. A. It is a Certificate of Assessment & Payments, Form 899, which amounts to a history of the account.

[fol. 15] Q. Was this document prepared at your request and under your supervision? A. It was prepared at our request from the documents contained in the District Director's Office and under his control, yes.

Q. Do you know whether those records are kept in the usual, normal course of business of the Internal Revenue Service? A. Yes.

Q. Is this document signed by the District Director or his duly designated deputy? A. It shows his initials, "R. J. S.," and that is Raymond J. Sylvester, after the Director's name.

Q. Can you testify that those are his initials, that those initials are Mr. Raymond J. Sylvester's? A. Yes, and there is a delegation in the District Director's (7) Office in Cleveland designating and empowering him to sign the Director's name.

Q. Does it bear the seal of the District Director of the Internal Revenue Service? A. Yes, it does.

Q. Very well.

Mr. Sowards: Before going any further on the contents, I am moving at this time that it be admitted into evidence, your Honor.

The Court: It will be admitted, but I would like to ask a few questions to clear up this matter in my own mind.

Mr. Sowards: Yes.

The Court: Under the prior lien statute the assessment which you say now is made by the Director was made by a commissioner, is that correct?

A. Many years ago, yes, sir, that is correct.

The Court: Then you received it, or the Director did receive it, from the commissioner?

A. Yes, that is the old provision, prior to 1954.

The Court: Prior to 1954.

A. Prior to 1954, I believe that's right. Prior to that they were made by the Assistant Director or Acting Director.

[fol. 16] (8) The Court: Or Acting Director?

A. Or Acting Director, yes.

The Court: Now, after the assessment is made by the Director is a demand made from the debtor?

A. Yes, according to Title 26, by mail.

The Court: Very well. That exhibit has been admitted.

Mr. Sowards: Thank you, sir.

Q. (By Mr. Sowards) Mr Gill, would you explain to the Court the contents of what has been admitted as Exhibit 1, and please give the dates of the assessments, the amounts, and the date of notice and demand? A. This assessment was made against Kurtz Roofing Company, Inc., 305-307 West Water Street, Sandusky, Ohio. It was made for Federal Unemployment Tax for the year 1959, calendar year 1959. The account number under which it was assessed is 60-9-80038.

It was received and scheduled for assessment on 9/30/60, and the assessment was made for $470.56 for tax, $117.64 for penalty, and $18.71 interest.

That interest was figured to the schedule date, which gives a total balance on the assessment, showing no payments, (9) of $606.91.

Mr. Britz: I have $609.

A. This totals up correctly, I believe. Yes. It adds up to $606.91. I think that is a typographical error. This is a certified # 899.

It was assessed on September 30, 1960. The first notice was sent to the taxpayer on September 30, 1960. A delinquent account was issued for collection by the Internal Revenue Service on November 4, 1960.

The Court: There is one point that is not clear in my mind. You said that interest was computed from what date?

A. From the due date of the return, which would be—that return is due by—

[fol. 17] The Court: Do you want to see this again?

A. No. It would be due by—let me think.

The Court: I mean the date at which you computed the interest.

A. To the scheduled date of assessment, September 30, 1960. This is the interest from the date it was due.

The Court: On 9/30/60?

A. Yes, sir.

(10) Q. (By Mr. Sowards) I hand you what has been marked Exhibit 2 and ask you to identify it. A. This is a Certificate of Assessments & Payments, Treasury Form No. 899, and amounts, again, to a history of the account as kept by the District Director, Cleveland.

Q. These are the records that are kept in the usual, normal course of business of the Internal Revenue Service? A. That's right.

Q. Does this bear the signature of the District Director or this person designated by him? A. Yes, the initials, "R. J. S.," as I testified in the earlier one. In other words, there is this delegation to Raymond J. Sylvester to sign it.

Q. And do you recognize that signature as being that of "R. J. S."? A. Yes.

Q. Does it bear the seal of the District Director of Internal Revenue? A. Yes, it does.

Mr. Sowards: I move that this document be admitted at this time.

The Court: It may be admitted.

Q. Will you explain to the Court the contents of the document, (11) Exhibit 2? A. This is sealed. May I open it?

Q. Go ahead, Mr. Gill. Now, would you, as in the prior case, state the account number, the date of the assessment, the amount, and the date of notice and demand upon the taxpayer for each of these accounts as shown? A. Well, this document covers one type of taxes withheld, federal taxes. It covers several different periods, all of [fol. 18] which were assessed against The Kurtz Roofing Company, Inc., 305-307 West Water Street, Sandusky, Ohio.

The first assessment is for the period ending 3/31/59. The Account Number is 60-5-167484. This was scheduled for assessment on 6/3/60. Tax was assessed in the amount of $3555.44; penalty was assessed in the amount of $888.86, and interest to the date of assessment is $236.98.

It reflects no payments made against that assessment of $4681.28. It was assessed on 6/30/60, and first notice went to the taxpayer on 6/3/60. It was issued for collection on 7/8/30.

The second one is an assessment for the same type of tax withheld, federal tax, for the period ending 6/30/59. The assessment Account Number is 60-5-167487. It was scheduled for assessment on 6/3/60, and was assessed tax

on the amount (12) of $5312.34; penalty in the amount of $1328.08, and interest in the amount of $273.48. No payments are reflected on the schedule, and left a total balance assessed of $6913.90.

It was assessed on 6/3/60. The first notice was sent to the taxpayer on the same date, and the delinquent account was issued for collection on 7/8/60.

The third assessment was for taxes withheld, federal taxes, for the period ending 9/30/59, Account No. 60-5-167486. It was scheduled for assessment on 6/30/60. I believe that is in error. The tax—

Q. (Interposing) Of your own knowledge, you say it may be a typographical error, an error in typing? A. I believe so, because the assessment date is 6/3/60, and it would show in 23-C. I believe there is a typographical error in that zero. It couldn't have been scheduled after it was assessed.

Q. May I ask the Account Number? A. Account No. 60-5-167486.

Mr. Sowards: On this particular account, your Honor, I would like to have this marked as Respondent's Exhibit 3 (handing same to the Court).

(Thereupon, the said exhibit was so marked and identified as Exhibit 3.)

[fol. 19] (13) The Court: In reciting these various accounts when you say that the first notice was sent to the taxpayer on such and such a date, that is your demand, is that correct?

A. Right.

The Court: That constitutes the demand of the taxpayer to pay this amount of money?

A. Yes.

Q. (By Mr. Sowards) I hand you what has been marked Exhibit 3 and ask that you identify it.

Mr. Sowards: If it please the Court, I am submitting this exhibit in order to clarify the typographical error contained on the Exhibit 2.

The Court: Very well.

A. This is a photostatic copy or some duplication of the Account Form 23-C, or assessment list, on which the assessment was made. It is dated 6/3/60.

Q. It is dated 6/3/60? A. Yes, 23-C is dated 6/3/60. That is the date.

Q. Mr. Gill, is this signed by the District Director or by the person delegated to sign his name or signature? I am speaking now of the certification. A. Yes, the certification. It is Melvin J. (Byrd's) name, (14) District Director, by "R.J.S.," Raymond J. Sylvester.

Q. He is delegated to sign it? A. Yes, he does.

Q. Does it contain the District Director's seal? A. Yes, it does.

Q. Does this photostat of the records contain the same account number which you were referring to on Exhibit 2? A. Well, on the assessment list itself it shows amounts of money for a particular date. This does not show account numbers, nor will it ever show account numbers.

Q. Was it not prepared from records or accounts maintained in the office of the Director? A. It was prepared from records showing that this amount was assessed on 6/3/60, which would have to be listed by amounts assessed.

[fol. 20] Mr. Sowards: I move that this be admitted in evidence to specifically show the date is correct on Exhibit 2.

The Court: It may be admitted.

Q. (By Mr. Sowards) Continue your explanation of the terms used on Exhibit 2. A. It shows the tax assessed for the period ending 9/30/59, and the amount was $4602.93; penalty assessed in the amount of (15) $1150.73, and the interest assessed is in the amount of $167.91. It reflects no payments having been made. The total assessment is $5921.57.

The Court: You have not been stating the interest date to which it is computed. Are they all to the date of the assessment?

A. Yes, sir. The assessment was made on 6/3/60. The first notice was issued on 6/3/60, and the account was issued for collection on 7/18/60. When that is issued for collection it is issued for enforced collection.

The next one is for the taxable period ending 12/31/59, and again it is withheld federal tax. The account number is 60-9-165589, and the schedule date was 9/30/60.

Assessment was made for tax in the amount of $2474.43; penalty in the amount of $618.61, and interest in the amount of $98.38. The interest, again, is to the date of assessment. No payments were received with the return.

The total amount assessed was $3191.42. This assessment was made on 9/30/60. The first notice to the taxpayer was on 9/30/60, and was issued for collection on 11/4/60.

The next one is for the period ending 3/30/60 on withheld federal taxes. Account No. 60-9-165588. It was scheduled for assessment on 9/30/60. Assessment was made for tax in the (16) amount of $535.63; penalty in the amount of $133.91, and the interest is to the date of assessment and in the amount of $13.39. No payments [fol. 21] were received. The total amount assessed is in the amount of $682.93.

This assessment was made on 9/30/60. The first notice to the taxpayer was on 9/30/60, and it was issued for collection on 11/4/60.

Q. Mr. Gill, when you say "first notice to the taxpayer" that means that the Internal Revenue Service has made a demand on the taxpayer to pay these accounts? A. That is correct. I believe demand is set up in the Internal Revenue Code.

Mr. Sowards: Do you have any further questions of this witness, your Honor?

The Court: Yes. May I see the exhibit?

(Thereupon, Mr. Gill, the witness, handed the said exhibit to the Court.)

The Court: Will you look at the two accounts on the second page of Exhibit 2? Both of those assessment dates are September 30, 1960, is that correct?

A. Yes, sir.

(17) The Court: Does the Government take the position that the Government had liens with respect to those assessments when the adjudication of bankruptcy took place on June 20, 1960, Mr. Sowards, as to those two particular accounts?

Mr. Sowards: After the date of bankruptcy we do not have; we have secured liens.

The Court: That is, on those two accounts?

Mr. Sowards: Yes. That would be Account No. 60-9-165589 and Account No. 60-9-165588.

The Court: In other words, you are not claiming any liens with respect to those two accounts?

Mr. Sowards: Not with respect to those two accounts.

I have no further questions of the witness, your Honor.

The Court: I have no further questions. Do you have anything else to say, Mr Sowards?

[fol. 22] COLLOQUY OF COURT AND COUNSEL

Mr. Sowards: No, your Honor. When we filed our Answer and Cross Petition we filed a Memorandum Brief, and if the Court so desires we will (18) happy to file a supplemental brief.

The Court: I believe you both know what the issue is.

Mr. Sowards: We like to say there are two issues.

The Court: What do you now say they are?

Mr. Sowards: Well, (a) whether the trustee in bankruptcy falls within one of the four excepted classes as set forth in Section 6223, Internal Revenue Code of 1954; and (b) whether or not a lien arising under Section 6321 of the Internal Revenue Code of 1954 is entitled to priority under the Bankruptcy Code as a secured lien.

The Court: I may be oversimplifying the matter, but it seems to me that it still looks to me like you have one question, your (a) classification.

Mr. Sowards: We think they are interrelated.

The Court: They probably are. Maybe I am oversimplyifying it. The issue, as I see it, is that the Government would have a lien except for the (19) trustee's position that he has a judgment creditor under the classification you recited as your (a).

Mr. Sowards: Yes, your Honor.

The Court: Are you resting? Is that all?

Mr. Sowards: Yes.

* * * *

[fol. 23]

EXHIBIT 1.

CERTIFICATE OF ASSESSMENTS AND PAYMENTS

NAME OF TAXPAYER	ADDRESS (Number, street, city, and State)	CLASS OF TAX	DATE OF REQUEST
Kurtz Roofing Co., Inc.	305-307 W. Water St., Sandusky, Ohio	FUTA	2-26-62

Taxable Period (a)	Account Number (b)	Received or Scheduled Date (c)	Description (d)	Liability and (Abatement) (e)	Payments and Credits Applied (f)	Balance (g)	Refunds and Credits Allowed (h)	Supplemental Information (i)
1959	60-9-880038	9-30-60	Tax	470.56				Assessed 9-30-60
			Penalty	117.64				First Notice 9-30-60
			Interest	18.71		609.91		Second Notice
								Delinquent Account
								Issued 10-14-60
								Lien Filed
								Assessed
								First Notice
								Second Notice
								Delinquent Account
								Issued
								Lien Filed
								Assessed
								First Notice
								Second Notice
								Delinquent Account
								Issued
								Lien Filed

I certify that the foregoing transcript of the account of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated, and all assessments, payments, penalties, interest, abatements, credits, and refunds relating thereto as disclosed by the records of this office as shown therein.

SIGNATURE OF DISTRICT DIRECTOR	LOCATION	DATE
/s/ MELVIN J. BURTON	Cleveland, Ohio	3-7-62-JW: cr

Over

FORM 899 (Rev. 7-58)

EXHIBIT 2.

CERTIFICATE OF ASSESSMENTS AND PAYMENTS

NAME OF TAXPAYER	ADDRESS *(Number, street, city, and State)*	CLASS OF TAX	DATE OF REQUEST
Kurtz Roofing Co., Inc.	305-307 W. Water St., Sandusky, Ohio	WFT	2-26-62

Taxable Period (a)	Account Number (b)	Received or Scheduled Date (c)	Description (d)	Liability and (Abatement) (e)	Payments and Credits Applied (f)	Balance (g)	Refunds and Credits Allowed (h)	Supplemental Information (i)
3-31-59	60-5-167484	6-30-60	Tax Penalty Interest	3,555.44 888.86 236.98		4,681.28		Assessed 6-30-60 First Notice 6-31-60 Second Notice Delinquent Account Issued 8-5-60 Lien Filed
3-31-59	60-ME-130775	7-22-60	Penalty (DR)	59.25		59.25		Assessed 7-22-60 First Notice 7-22-60 Second Notice Delinquent Account Issued 8-26-60 Lien Filed
6-30-59	60-5-167487	6-3-60	Tax Penalty Interest	5,312.34 1,328.08 273.48		6,913.90		Assessed 6-3-60 First Notice 6-31-60 Second Notice Delinquent Account Issued 8-5-60 Lien Filed

I certify that the foregoing transcript of the account of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated, and all assessments, payments, penalties, interest, abatements, credits, and refunds relating thereto as disclosed by the records of this office as shown therein.

SIGNATURE OF DISTRICT DIRECTOR	LOCATION	DATE
/s/ MELVIN J. BURTON	Cleveland, Ohio	3-7-62-JW: cr

Over

FORM 899 (Rev. 7-58)

CERTIFICATE OF ASSESSMENTS AND PAYMENTS

NAME OF TAXPAYER	ADDRESS *(Number, street, city, and State)*	CLASS OF TAX	DATE OF REQUEST
Kurtz Roofing Co., Inc.	305-307 W. Water St., Sandusky, Ohio	WFT	2-26-62

Taxable Period *(a)*	Account Number *(b)*	Received or Scheduled Date *(c)*	Description *(d)*	Liability and (Abatement) *(e)*	Payments and Credits Applied *(f)*	Balance *(g)*	Refunds and Credits Allowed *(h)*	Supplemental Information *(i)*
6-30-59	60-ME-130776	7-22-60	Penalty (DR)	88.53		88.53		Assessed 7-22-60 First Notice 7-22-60 Second Notice Delinquent Account Issued 8-26-60 Lien Filed
9-30-59	60-5-167486	6-3-60	Tax Penalty Interest	4,602.93 1,150.73 167.91		5,921.57		Assessed 6-30-60 First Notice 6-30-60 Second Notice Delinquent Account Issued 8-5-60 Lien Filed
9-30-59	60-ME-130777	7-22-60	Penalty (DR)	76.70		76.70		Assessed 7-22-60 First Notice 7-22-60 Second Notice Delinquent Account Issued 8-26-60 Lien Filed

I certify that the foregoing transcript of the account of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated, and all assessments, payments, penalties, interest, abatements, credits, and refunds relating thereto as disclosed by the records of this office as shown therein.

SIGNATURE OF DISTRICT DIRECTOR	LOCATION	DATE
/s/ MELVIN J. BURTON	Cleveland, Ohio	3-7-62-JW: cr

Over

CERTIFICATE OF ASSESSMENTS AND PAYMENTS

NAME OF TAXPAYER	ADDRESS (Number, street, city, and State)	CLASS OF TAX	DATE OF REQUEST
Kurtz Roofing Co., Inc.	305 W. Water St., Sandusky, Ohio	WFT	2-26-62

Taxable Period (a)	Account Number (b)	Received or Scheduled Date (c)	Description (d)	Liability and (Abatement) (e)	Payments and Credits Applied (f)	Balance (g)	Refunds and Credits Allowed (h)	Supplemental Information (i)
12-31-59	60-9-165589	9-30-60	Tax Penalty Interest	2,474.43 618.61 98.38		3,191.42		Assessed 9-30-60 First Notice 9-30-60 Second Notice Delinquent Account Issued 10-14-60 Lien Filed
12-31-59	60-11-290053	11-30-60	Penalty (DR)	41.23		41.23		Assessed 11-30-60 First Notice 11-30-60 Second Notice Delinquent Account Issued 1-6-61 Lien Filed
3-31-60	60-9-165588	9-30-60	Tax Penalty Interest	535.63 133.91 13.39		682.93		Assessed 9-30-60 First Notice 9-30-60 Second Notice Delinquent Account Issued 10-14-60 Lien Filed

I certify that the foregoing transcript of the account of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated, and all assessments, payments, penalties, interest, abatements, credits, and refunds relating thereto as disclosed by the records of this office as shown therein.

SIGNATURE OF DISTRICT DIRECTOR	LOCATION	DATE
/s/ MELVIN J. BURTON	Cleveland, Ohio	3-7-62-JW: cr

Over

[fol. 27]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION

PETITION FOR REVIEW.—Filed June 20, 1962

To T. Kenneth Mattimoe, Esq., Referee in Bankruptcy:

The petition of the United States of America respectfully represents:

1. Your petitioner is aggrieved by the order herein of T. Kenneth Mattimoe, Referee in Bankruptcy, dated June 12, 1962, a copy of which order is annexed hereto, marked Exhibit A, and made a part hereof.

2. The referee erred in respect to said order in failing to find that the District Director of Internal Revenue and the United States duly and timely filed its sworn claim for Internal Revenue taxes in this proceeding and that said claim for Internal Revenue taxes in this proceeding and that said claim specifies the amounts of the statutory tax liens of the United States with the dates thereof, all as shown by the files and records of the referee in this proceeding.

3. The referee erred in respect to said order in its sixth paragraph in failing to find as fact that the amounts of the liens include additional statutory 6% interest upon the amounts of tax assessed from the date of the tax assessments on June 3, 1960 to June 20, 1960, the date on which the petition in bankruptcy in this case was filed.

4. The referee erred in respect to said order in its eighth paragraph in concluding as a matter of law that the "trustee, herein, had, on the 20th day of June 1960, the status of a judgment creditor of the bankrupt and that the liens of the United States of America are therefore invalid as against him."

5. The referee erred in respect to said order as a matter of law in overruling the objections of the United States of America to the proposed order of distribution.

6. The referee erred in respect to said order as a matter of law in dismissing the Answer and Cross Petition herein of the United States of America.

[fol. 28] 7. The referee erred in respect to said order as a matter of law in barring the United States from asserting any lien against the funds in the hands of the trustee.

WHEREFORE your petitioner prays that said order be reviewed by a Judge in accordance with the provisions of the Act of Congress relating to Bankruptcy, that said order be reversed, and that the interest of the United States be protected as far as its statutory liens and other rights are concerned, and that your petitioner have such other and further relief as is just.

For the Petitioner:

MERLE M. MCCURDY,
United States Attorney,

by HARLAND M. BRITZ,
Assistant United States Attorney.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
WESTERN DISTRICT

REFEREE'S CERTIFICATE ON PETITION FOR REVIEW.—Filed December 11, 1962

To: Honorable Frank L. Kloeb, Judge, United States District Court, Northern District of Ohio, Western Division:

I, T. Kenneth Mattimoe, Referee in Bankruptcy, in charge of the above proceeding, do hereby certify:

The Kurtz Roofing Company is an Ohio corporation which had its principal place of business in Sandusky, Ohio. After bankruptcy, all of the personal property of the corporation was sold and all assets were reduced to cash. The property sold consisted of motor vehicles, roofing materials on hand, machinery and other similar equipment and materials. The last orders confirming sale were entered on February 14, 1962.

Shortly thereafter, notice was given to all creditors of the final meeting of creditors. This meeting was set for [fol. 29] March 5, 1962. Included in the notice was a summary of the administration of the bankrupt's estate and a proposal with respect to the distribution of the assets totaling $13,893.02. The proposed disposition provided for payment of a dividend amounting to 53.48% on all tax claims. They were to be treated as priority claims. $9,202.35 was proposed to be paid to the District Director of Internal Revenue.

Before the date of the final hearing, on March 2, 1962, an answer was filed on behalf of the United States and the District Director of Internal Revenue asserting statutory tax liens in indefinite amounts and praying that the interests of the United States be protected insofar as its statutory liens and other rights are concerned.

After notice was given, a hearing on the allegations of this answer was held on May 2, 1962. Subsequently, on June 12, 1962, an order was entered denying the claim of statutory tax lien asserted by the District Director of Internal Revenue and the United States.

It is from this order that a petition for review was filed on June 20, 1962.

THE EVIDENCE.

At the hearing on May 2, 1962, the United States claimed liens based upon Federal Withholding Income Tax due from the bankrupt but not paid as follows:

Period	Tax
March 31, 1959 Withholding Tax	$3,555.44
June 30, 1959 Withholding Tax	5,312.34
September 30, 1959 Withholding Tax	4,602.93

The evidence submitted by the United States as to these items (Accounts No. 60-5-167484, 60-5-167487 and 60-5-167486 in Exhibits 1 and 2) showed that assessments of these taxes with interest to the date of the as-

[fol. 30] sessment were made by the District Director of Internal Revenue on June 3, 1960, and that demand for payment was made on bankrupt by mail the same day.

Evidence was adduced, also, as to other tax items, assessments of which were made after June 20, 1960, the date of the bankruptcy. These are Accounts No. 60-9-880038, 60-9-165589 and 60-9-165588 in Exhibits 1 and 2.

The evidence is undisputed that, although the taxes for which statutory tax liens are claimed were "assessed" before bankruptcy, no notice was filed with the Recorder of Erie County, the County in which the bankrupt's property was located, prior to bankruptcy.

THE ISSUES PRESENTED.

By statute, Congress has made a Trustee in Bankruptcy a "lien creditor" for the purpose of determining priority of claims to the bankrupt's property, and this has always been interpreted to include a grant of the rights of a judgment lien creditor to the Trustee in Bankruptcy. Bankruptcy Act, Sec. 70c, 11 U. S. C. Sec. 110(c).

By other statutes, Congress has given the United States a statutory tax lien against the property of a taxpayer which arises on the date the assessment of such tax is made. An exception to this statute is that such a lien shall not be valid against a "judgment creditor" unless notice is filed in an office designated by state law or with the Clerk of the District Court. 26 U. S. C. Secs. 6321, 6323.

By statute, the Recorder of the county in which the bankrupt had its principle place of business is the office designated by the State of Ohio for the filing of the notices of lien. Sec. 317.09 O. R. C. There is no evidence nor claim that notice was filed with the appropriate County Recorder nor with the Clerk of the District Court.

Stated affirmatively, the single issue presented is:

Considering (1) the traditional position of a Trustee in Bankruptcy as a "universal judgment lien creditor," [fol. 31] (2) the all-inclusive terminology of the Bankruptcy Act which establishes a Trustee as a creditor holding a lien by legal or equitable proceedings [Bankruptcy

Act Sec. 70c, 11 U. S. C. Sec. 110(c)] and (3) the legislative history of the two Congressional enactments under consideration (Bankruptcy Act Sec. 70c, 11 U. S. C. Sec. 110(c) and 26 U. S. C. Secs. 6321 and 6323), the Trustee in Bankruptcy is a judgment creditor and the tax lien claimed is not "valid * * * as against" him by reason of the statutory exception created by 26 U. S. C. Sec. 6323.

Findings of Fact.

1. On June 20, 1960, Kurtz Roofing Company filed its voluntary petition in bankruptcy with this Court. It is an Ohio corporation and, prior to bankruptcy, was engaged in business with its principal office and place of business in Sankusky, Erie County, Ohio.

2. Thereafter on July 20, 1960, Ray F. Spears was appointed Trustee in Bankruptcy for the bankrupt and he is now acting in that capacity.

3. All of the property with respect to which the United States claims and has claimed a lien for federal taxes was personal property. At all times pertinent to this proceeding, it has been situated in Erie County, Ohio. It was in the possession and control of the bankrupt prior to June 20, 1960 and, until sold, it was in the possession and control of this Court and its Trustee in Bankruptcy after that date.

4. The property involved in this proceeding which is claimed to be subject to federal statutory tax lien, was not at any time taken into the possession of the United States.

5. As of June 20, 1960, the Trustee in Bankruptcy herein became, as to all property subject to this proceeding, a statutory judgment lien creditor with all the rights, remedies and powers which could arise from a legal lien on all of such property, including the rights of a judgment creditor under 26 U.S.C. Sec. 6323.

[fol. 32] 6. On September 30, 1960, the District Director of Internal Revenue assessed certain taxes with interest to the date of the assessment and made demand on the bankrupt for their payment on the same date. Since the date of the assessment and demand for payment of these taxes was subsequent to June 20, 1960, the date of

bankruptcy, the interest and rights of the Trustee are prior to any liens of the United States for these taxes. They are:

Account Number	Tax	Amount
60-9-880038	Federal Unemployment	$ 470.56
	Interest to 9-30-60	18.71
60-9-165588	Withholding Tax	535.63
	Interest to 9-30-60	13.39
60-9-165589	Withholding Tax	2,474.43
	Interest to 9-30-60	98.30

7. On all of the accounts on which the United States claims liens there are included certain items as penalties. Even if all of the liens were valid, penalties included in such liens cannot be allowed. The amounts of these penalties are:

Account Number	Amount
60-5-167484	$ 888.86
60-5-167486	1,150.73
60-5-167487	1,328.08
60-9-165589	618.61
60-9-165588	133.91
60-9-880038	117.64
Total	$4,237.83

8. On June 3, 1960, the District Director of Internal Revenue assessed certain taxes with interest to the date of the assessment and made demand on the bankrupt for their payment on the same date. However, no notice of federal tax liens for internal revenue taxes was at any time filed in the office of the Recorder of Erie County, [fol. 33] Ohio, nor the office of the Clerk of Court for this Judicial District. These are, respectively, the county and United States Judicial District in which the property claimed to be subject to the lien was situated. Such items of taxes and interest are:

Account Number	Tax	Amount
60-5-167484	Withholding Tax	$3,555.44
	Interest to 6/30/60	236.98
60-5-167486	Withholding Tax	4,602.93
	Interest to 6/30/60	167.91
60-5-167487	Withholding Tax	5,312.34
	Interest to 6/3/60	273.48
	Total	$14,149.08

9. The statutory tax liens of the United States for the taxes and interest described in Finding Number 8 above are not valid as against the Trustee in Bankruptcy, because he is a judgment lien creditor.

10. Section 47a (2) of the Bankruptcy Act, which was enacted and became effective in 1910, recognized a Trustee in Bankruptcy as "a judgment creditor holding an execution duly returned unsatisfied" or with respect to property in the custody of the Bankruptcy Court as having "all the rights, remedies, and powers of a creditor holding a lien by equitable or legal proceedings thereon." By amendments to the Bankruptcy Act enacted in 1938 and 1950, the United States Congress intended to continue Trustees in Bankruptcy in their traditional status of a judgment lien creditor with the same rights and priorities as any conventional judgment creditor.

11. Prior to 1913, the statutory tax lien (now codified in 26 U. S. C. Sec. 6321) was valid as to all others without filing or recording. In that year, the United States Congress amended the Revenue Code to provide that such lien should be invalid as to judgment creditors unless notice was filed. This amendment was enacted and became effective after the now traditional status of a Trus- [fol. 34] tee in Bankruptcy as a judgment lien creditor had become the law of the United States by the enactment of Section 47a(2) of the Bankruptcy Act.

Conclusions of Law.

1. For the purpose of determining the priority of liens and interest in property of a bankrupt and by statutory

enactment, United States Congress granted to Trustees in Bankruptcy the status of a creditor holding a lien obtained by legal proceedings. This status is greater than and includes that of a judgment creditor of the bankrupt holding a judgment lien against its property.

2. For the purpose of creating and determining the priority of liens to secure the collection of federal taxes and by statutory enactment, United States Congress has provided that federal tax liens can be created by assessment and demand for payment, but that such liens shall not be valid as against a mortgagee, pledgee, purchaser or judgment creditor until notice of the lien has been filed with the County Recorder or Clerk of th United States District Court for the county or district, spectively, in which the property subject of the lien is situated.

3. The legislative purpose of Section 70c of the Bankruptcy Act, 11 U. S. C. Section 110(c), is to preserve for the Trustee in Bankruptcy and the general creditors of the bankrupt all property not subject to a lien supported by public notice existing on the date of the adjudication in bankruptcy.

4. The legislative purpose of 26 U. S. C. Section 6323 (a) is to protect and preserve the priority of liens of judgment lien creditors over federal tax liens of which no public notice is given. A Trustee in Bankruptcy is a judgment creditor within the meaning of this statute.

5. Because the assessments and demands for payment were made subsequent to bankruptcy with respect to the taxes claimed in Accounts No. 60 9 830038, 60 9 165588 and 60 9 165589, the federal tax liens claimed for those accounts are invalid as against the Trustee in Bankruptcy.

[fol. 35] 6. Inasmuch as no notice of federal tax lien was filed prior to bankruptcy with respect to the taxes claimed in Accounts No. 60 5 167484, 60 5 167486 and 60 5 167487, the federal tax lien claims for those accounts are invalid as to the Trustee in Bankruptcy.

7. The claim of the United States for penalties must, as a matter of law, be disallowed.

MEMORANDUM.

The facts in this proceeding are not in dispute. In the case of three tax accounts, neither the assessment nor the demand was made until more than 90 days after the adjudication in bankruptcy. No claim of lien is advanced as to these accounts.

With respect to all penalties, the United States agrees that they cannot be allowed. (R. 4) *Simonson vs. Granquist*, 369 U.S. 38, 40 (1962).

In the case of three other tax accounts for federal withholding tax, the assessment and demand for payment were made on June 3, 1960. This was 17 days before bankruptcy on June 20, 1960. However, no notice of tax lien was filed (at any time) with the County Recorder or the Clerk of the United States District Court in the county or district, respectively, where the property was situated.

United States claims that its statutory tax liens were perfected by reason of the assessment and demand made on June 3, 1960 and the subsequent failure of the bankrupt to make payment even though no notice was filed.

The Trustee contends that any such lien is invalid as to him by reason of the provisions of the Internal Revenue Code, 26 U.S.C. Sec. 6323, and of the Bankruptcy Act, Sec. 70c, 11 U.S.C. Sec. 70(c). The Revenue Code provides that statutory tax liens are not valid against judgment creditors unless notice is appropriately filed, and Section 70c, he asserts, is a Congressional enactment that he shall be a judgment lien creditor in adjudging rights in the bankruptcy property.

[fol. 36] Your Referee has accepted as correct the contention of the Trustee in Bankruptcy that he is a judgment creditor and that any tax lien is invalid as to him.

The superiority of a Trustee's right to bankrupts' property over claims of secret liens was established by Congressional enactment after years of controversy and litigation. Prior to the year 1910, Section 70a of the Bankruptcy Act provided that "the Trustee * * * shall * * * be vested * * * with the title of the bankrupt * * * to all * * * (5) property * * * which might have been levied upon and sold under judicial process against him

* * *." Despite this broad language, it was held that an unrecorded conditional sale contract was superior in right to the statutory title of the Trustee. *York Manufacturing Co. vs. Cassell*, 201 U.S. 344, 352 (1906); *Security Warehousing Co. vs. Hand*, 206 U.S. 415, 425 (1907). One of the reasons for such holding as stated in the latter case (p. 425) was "because * * * the adjudication (in bankruptcy) did not operate as the equivalent of a judgment or attachment or other specific lien on the property."

In 1910, Congress undertook specifically to remedy this situation by the enactment of Section 47a(2) of the Bankruptcy Act. This amendment was aimed directly at "the evil of secret liens." It had two distinct ideas. As stated in 45 *Cong. Record* 2277 (1910), these were said to be:

> "First, that as to the property in the custody of the bankruptcy court the bankruptcy trustee shall be considered to have the same title that a creditor holding an execution or other lien by legal or equitable proceedings levied upon that property would have under state law; and, second, that as to property not in the custody of the bankruptcy court, the trustee should stand in the position of a judgment creditor holding an execution returned unsatisfied, thus entitling him to proceed precisely as an *individual creditor* might have done to subject assets." (Emphasis added.)

[fol. 37] The amendment, Section 47a(2) of the Bankruptcy Act, was in full compliance with this statement from the floor of Congress. And the Trustee in Bankruptcy was given the status of judgment creditor in all situations where it was necessary to determine the priority of the rights of the Bankruptcy Court and its Trustee with regard to unrecorded liens.

This section continued in substantially the same form until its amendment in 1950. At that time, and as to all property "whether or not coming into possession or control of the court" the Trustee was given the status of "a creditor then holding a lien * * * by legal or equitable proceedings." Sec. 70c of the Bankruptcy Act, 11 U.S.C.

Sec. 110(c). This provision, as well as the discussions, reports and considerations with respect to it, make clear that the latter clause includes within its meaning a creditor holding a judgment lien and thus a "judgment creditor." Senate Report No. 72, House Report No. 1293 (S. 88), U.S. Code Cong. Serv., 81st Cong., 2nd Sess. (1950) 1985, 1986; 96 *Cong. Record* 1529, 1532 (1950); *Hearing Before Subcommittee No. 2 of the Committee on the Judiciary, House of Representatives*, 81st Cong., 1st Sess. on H. R. 272 and H. R. 2691, March 14, 16 and 18, 1949, Serial No. 7, pp. 8, 11-12, 49, 61, 138; *Hearings Before Subcommittee on Bankruptcy and Reorganization of the Committee on the Judiciary, House of Representatives*, 80th Cong., 2nd Sess., H. R. 2412 and H. R. 5834, May 7, 1948, Serial No. 19, pp. 9, 10, 14, 17, 47, 49, 63, 65, 148.

Senate Report No. 72 (House Report No. 1293), *supra*, makes the judgment lien creditor status of the Trustee in Bankruptcy clear with these words at pages 1985-1986:

> "(b) Section 2 of the bill amends section 70c of the bankruptcy Act, dealing with the general rights of a trustee in bankruptcy, and is essentially correlative to the amendment to section 60a, effected by section 1 of the bill. Under existing law, a trustee as to all property in the possession or under the control of the bankrupt, at the date of bankruptcy, is deemed [fol. 38] vested, as of the date of bankruptcy, with all of the rights of a creditor then holding a lien by legal or equitable proceedings, and, as to all other property, with the rights of a judgment creditor then holding an unsatisfied execution.
>
> "In view of the amendment made to section 60a, as well as intrinsically, it is deemed wise to place the trustee in bankruptcy in the position of a lien creditor with respect to all of the bankrupt's property, and section 2 of the bill so amends section 70c.
>
> "II. STATEMENT.
>
> "Traditionally, it is the primary office of the Bankruptcy Act to protect creditors, both secured and

unsecured; to marshal the bankrupt's assets; and to distribute them among his creditors equitably and ratably, in accordance with their respective rights and interests.

"It follows from these broad general principles, as well as from the basic provisions of the Bankruptcy Act itself that—

"(A) A trustee in bankruptcy occupies the position of a 'universal' judgment or lien creditor, with all such a creditor's remedies (Bankruptcy Act, sec. 70); * * *"

Subcommittee Chairman Hobbs further confirmed this on the floor of the House of Representatives stating:

"All that a trustee needs is a judgment from a court of competent jurisdiction giving him his lien as a preference * * * and that is what this bill does." (96 Cong. Record 1532, *supra.*)

Congress thereafter enacted an amendment to Section 70c of the Bankruptcy Act, 11 U.S.C. Section 110(c) providing that as of the date of bankruptcy, the Trustee "shall be deemed vested as of such date with all the rights, remedies and powers of a creditor then holding a lien" on the property of the bankrupt obtained by legal or equita- [fol. 39] ble proceedings. Thereby establishing the Trustee as a judgment lien creditor.

Over the same period of time, the federal statutory tax lien based upon 26 U.S.C. Section 6321 and its predecessor section was progressing from a strict interpretation which permitted no exceptions to the present position which recognizes identified statutory exceptions. *United States vs. Snyder*, 149 U.S. 210, 214 (1893); 26 U.S.C. Sec. 6322.

It was the court's holding in the case of *United States vs. Snyder, supra*, that the federal statutory tax lien was valid *without recording* even against a bona fide purchaser which brought about the amendment that is now 26 U.S.C. Section 6323. The section, of course, provides that no federal tax lien under Section 6321 "shall be valid as against any mortgagee, pledgee, purchaser or judgment

creditor until notice thereof has been filed" as required by state law or with the Clerk of the United States District Court in the district where the property is located. This amendment was adopted in 1913, three years after Congress had established Trustees in Bankruptcy as judgment lien creditors. 37 Stat. 1016 (1913). "Effect of Federal Tax Lien on Ohio Real Property," Charles R. Leach, Jr., 16 Ohio St. L. J. 92-108 (1955).

Each of these amendments was remedial in nature and is therefore to be given a liberal construction to attain the end intended by Congress. *Seasongood vs. C. I. R.*, 227 F. 2d 907 (6 Cir. 1955).

Also applicable are the guiding principles of statutory construction that tax statutes should be construed in favor of the taxpayer, *Delaney, et al. vs. Denver*, 185 F. 2d 246, 253 (10 Cir. 1950), and that statutes which are related must be construed together, *Offutt Housing Co. vs. County of Sarpy*, 351 U.S. 253, [illegible] (1956); *Allen, etc. vs. Grand Central Aircraft Co.*, 347 U.S. 535, 541 (1954).

The Supreme Court has stated its thought that "in Section 3672 (26 U.S.C.A. Sec. 6321) Congress used the words 'judgment creditor' in the usual, conventional [fol. 40] sense of a judgment of a court of record," since all states have such courts. *United States vs. Gilbert Associates, Inc.*, 345 U.S. 361 (1953). The legislative history referred to above and the judicial decisions discussed below indicate that Congress expected a Trustee in Bankruptcy to have just this status. *Meyers, Trustee vs. Matley*, 318 U.S. 622, 627 (1943); *In re Toms*, 101 F. 2d 617, 619 (6 Cir. 1939). In accord with these two controlling decisions are the following decisions. *Jackson vs. Menick*, 260 F. 2d 563, 564 (9 Cir. 1958); *B. F. Avery & Sons Co. vs. Davis*, 226 F. 2d 942, 945 (5 Cir. 1955); *Sampsell vs. Straub*, 194 F. 2d 228, 231 (9 Cir. 1951); cert. denied 343 U.S. 927 (earlier opinion 189 F. 2d 379, 381-382); *In re Lustron Corp.*, 184 F. 2d 789, 793 (7 Cir. 1950); cert. denied 340 U.S. 946; *Georgia Association etc. vs. Allen*, 112 F. 2d 52, 56 (5 Cir. 1940); *In re Cobb*, 14 F. Supp. 465, 466-467 (D.C. E.D. Mich. 1936).

Still other cases unequivocally acknowledge that a Trustee in Bankruptcy, as of the date of bankruptcy, has

been endowed with rights which by recognition of common legal meaning make him a judgment lien creditor. *Brookhaven Bank & Trust Co. vs. Gwin*, 253 F. 2d 17, 23 (5 Cir. 1958); *In re Ripp*, 242 F. 2d 849, 852 (7 Cir. 1957); *Salkind vs. Dubois*, 105 F. 2d 640 (3 Cir. 1937).

In the light of the statute and related authorities, the Referee is bound to follow the principles laid down in the Supreme Court decision in *Meyers vs. Matley, supra.* At page 627 the court undeniably held that a Trustee in Bankruptcy is a judgment creditor. It used these words:

> "Historically, and under the theory of the present Act, bankruptcy has the force and effect of the levy of equitable distribution amongst them of the bankrupt's assets. The trustee is vested not only with the title of the bankrupt but clothed with the right of an execution creditor with a levy on the property which passes into the trustee's custody."

The Court of Appeals for the Sixth Circuit stated the same holding in the case of *In re Toms, supra*, at page 619 of its opinion it said:

[fol. 41] "Under Section 47a as amended, 11 U.S.C.A. § 75(a) in determining conflict of title between the trustee and third parties, he does not stand in place of the bankrupt, but his rights are to be determined as though he were a creditor holding a lien by legal or equitable proceedings at the time the petition is filed, if the property is in the possession of the bankrupt or trustee. If unpossessed, the rights and remedies of the trustee shall be determined as though he were a judgment creditor holding an execution duly returned unsatisfied * * *."

The dictum of Judge Allen in *In re Taylorcraft Aviation Corp.*, 168 F. 2d 808, 810 (6 Cir. 1948), cannot alter this conclusion. It was a statement beyond the issues of the case and did not overrule the case of *In re Toms, supra.* See *United States vs. Sands*, 174 F. 2d 384, 385 (2 Cir. 1949).

Recent decisions have refused to accept the clear Congressional mandate creating judgment lien creditor status

for a Trustee in Bankruptcy. *Simonson vs. Granquist*, 287 F. 2d 489 (9 Cir. 1961); *In re Fidelity Tube Corp.*, 278 F. 2d 776 (3 Cir. 1959); cert. denied 364 U.S. 828. The erroneous reasoning of these cases is made clear in the dissenting opinion of Judge Kalodner in the latter case.

However, regardless of the interpretations of the appellate courts, the controlling authorities are the statutes, 26 U.S.C. Secs. 6321-6323 and 11 U.S.C. Sec. 110 (c), and their scope and purposes are made clear by their legislative history and the decision of the United States Supreme Court in the case of *Meyers v. Matley, supra.* The Referee has no choice but to accept and follow this law. The Trustee in Bankruptcy in this case is a judgment creditor within the meaning of 26 U.S.C. Section 6323 and the statutory tax liens are invalid as to him because no notice of such liens was filed in accordance with law.

Herewith I hand up for consideration of your Honor the following documents which are part of this Certificate:

[fol. 42]

Number	*Document*	*Filed*
		1960
1	Petition in bankruptcy	June 20
2	Order appointing Trustee in Bankruptcy	July 20
		1962
3	Notice of final meeting of creditors	February 16
4	Answer of United States	March 2
5	Order denying United States' claim of statutory tax lien	June 12
6	Transcript of hearing of May 23, 1962 together with exhibits	June 27
7	Petition for review of order of June 12, 1962	June 20

T. KENNETH MATTIMOE,
Referee in Bankruptcy.

CC: Ray F. Spears, Esquire
502 Feick Building, Sandusky, Ohio

Frank Buckingham, Esquire
231 W. Washington Row, Sandusky, Ohio

Robert B. Gosline, Esquire
Shumaker, Loop & Kendrick
811 Madison Avenue, Toledo 2, Ohio

Harland M. Britz, Esquire
Assistant United States Attorney
U. S. Court House, Toledo, Ohio

Buckley D. Sowarts, Esquire
Internal Revenue Service
1630 Williamson Building
215 Euclid Avenue, Cleveland 14, Ohio

District Director of Internal Revenue
P. O. Box 6902, Cleveland, Ohio

[fol. 43]

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Ohio
Western Division

ORDER DISMISSING PETITION FOR REVIEW, ETC.—March 20, 1963.

At Toledo, in said district, this 20th day of March, 1963.

This day the matter of the Petition of the United States of America for Review of the Referee's Order, entered herein on June 12, 1962, overruling the objections of the United States of America to the proposed Order of Distribution, dismissing the answer and cross petition of the United States of America and forever barring the United States of America from asserting any lien against the funds in the hands of the Trustee, came on to be considered upon the Certificate of the Referee and the documents attached thereto, including the transcript of testimony and evidence, the exhibits offered and received in evidence on hearing before the Referee, the Petitions for Review and the briefs of counsel.

The Court, being fully advised in the premises, finds that the Findings and Conclusions of the Referee set out in his Certificate are correct and should be confirmed and adopted as the Findings and Conclusions of the Court, and that the Order described herein is well taken and should be confirmed.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Petition for Review described herein be, and the same hereby is, dismissed; that the Findings and Conclusions of the Referee set out in his Certificate be, and the same are hereby confirmed and adopted as the Findings and Conclusions of the Court; and that the Order of the Referee described herein be, and the same hereby is approved and confirmed.

/s/ Frank L. Kloeb,
United States District Judge.

[fol. 44]

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Ohio,
Western Division

NOTICE OF APPEAL.—Filed April 17, 1963.

Notice is hereby given that the United States of America, a creditor in the above-captioned bankruptcy, hereby appeals to the Circuit Court of Appeals for the Sixth Circuit from the order of this Court entered on March 20, 1963, dismissing the Petition for Review filed by the said United States of America and approving and confirming the Findings, Conclusions, and Order of the Referee in Bankruptcy.

MERLE M. MCCURDY,
United States Attorney,

HARLAND M. BRITZ,
Assistant United States Attorney.

[fol. 45]

[MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
February 6, 1964 (Omitted in printing)]

[fol. 47]

[File Endorsement Omitted]

No. 15405

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In the Matter of

THE KURTZ ROOFING COMPANY,
d/b/a KURTZ SUPPLY COMPANY,
Bankrupt,

UNITED STATES OF AMERICA, APPELLANT

v.

RAY F. SPEERS, Trustee in Bankruptcy, APPELLEE

Appeal from the United States District Court
for the Northern District of Ohio

OPINION—Decided August 4, 1964.

Before: CECIL and O'SULLIVAN, Circuit Judges, and MCALLISTER, Senior Circuit Judge.

O'SULLIVAN, Circuit Judge. Section 6323(a) of the Internal Revenue Code of 1954, 26 U.S.C. § 6323(a), protects a "judgment creditor" against unfiled federal tax liens. This appeal requires us to decide whether Section 70(c) of the Bankruptcy Act, 11 U.S.C. § 110(c), confers upon a trustee in bankruptcy the right of a judgment creditor to resist imposition on the bankrupt's assets of a federal tax lien not filed prior to bankruptcy. The referee in bankruptcy and the District Judge held that the trustee had such right, and treated the government on a par with other priority claimants, as provided in Section 64(a) of the Bankruptcy Act, 11 U.S.C. § 104(a). We agree with

this ruling. Under it, the government will receive 53.48% of $14,149.08, the amount for which it asserts a lien. [fol. 48] The government taxes here involved were assessed against Kurtz Supply Company on June 3, 1960. That company was adjudicated a bankrupt on June 20, 1960. Under Sections 6321 and 6322 of Int. Rev. Code of 1954, 26 U.S.C. §§ 6321, 6322, the asserted federal tax lien was perfected as of the date of assessment and demand, June 3, 1960. Section 6323(a) of the Code, however, provides that:

> ". . . the lien imposed by section 6321 *shall not be valid* as against any mortgagee, pledgee, purchaser, or *judgment creditor* until notice thereof has been filed by the Secretary or his delegate . . . ." (Emphasis supplied.)

No such notice was filed in this case prior to bankruptcy.

Section 70(c) of the Bankruptcy Act, 11 U.S.C. § 110 (c), provides in pertinent part:

> "The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

The question before us, then, is whether the words "a creditor then holding a lien" upon the bankrupt's assets "by legal . . . proceedings" describe, among others, a judgment creditor. If so, the bankruptcy trustee, under 70(c), has all the rights of such judgment creditor. A judgment creditor becomes such by *legal proceedings* and obtains a lien on his debtor's assets by the levy of an execution. He then, indeed, is "a creditor . . . holding a lien thereon." We believe that in using the broad language now contained in 70(c), Congress deliberately avoided precise definition of the various types of lienholders whose status it conferred on the trustee in bankruptcy. Prior to 1950 and 1952 amendments to Section 70

(c), a distinction was drawn between property of the bankrupt which came into the possession of the bankruptcy court and that which did not. As to the former, the trustee was deemed vested "with all the rights, remedies, and powers of a creditor then holding a [fol. 49] lien thereon by legal or equitable proceedings" just as he is under the present wording without regard to possession. As to property not coming into possession of the court, however, he was deemed vested "with all the rights, remedies, and powers of a judgment creditor then holding an execution duly returned unsatisfied . . . ." To be sure, Congress in these amendments dropped explicit mention of judgment creditors and eliminated, for purposes of the trustee's rights, the distinction between property coming into his possession and that which does not. But "the legislative history indicates that it was the intention of Congress by the 1950 and 1952 amendments to *expand* the rights of a trustee in bankruptcy . . . ." *In re Fidelity Tube Corp.*, 278 F. (2) 776, 781 (3rd Cir. 1960). (Emphasis supplied.) We are persuaded that Congress intended to strengthen, not weaken, the trustee's rights against all forms of secret liens and retained the broader language, once used only as to property within the court's possession, so as to include all forms of lienholders, whether by judgment, levy of execution, or otherwise.

A trustee in bankruptcy obviously is not in fact a judgment creditor, but by Congressional Act he is "deemed vested . . . with all the rights, remedies, and powers" of a judgment creditor. One of the "rights, remedies, and powers" of a judgment creditor is the right to resist a government lien for taxes where notice thereof is not filed as required by Section 6323(a). The Bankruptcy Act does not say that the special rights conferred by Section 70(c) shall be effective against all liens except those for taxes imposed under Section 6321 of the Revenue Code. We do not understand the government to deny the general propriety of this reading. Instead, it asserts that although "Section 70c may give a trustee in bankruptcy *some of the rights of a judgment creditor*," and accords him "the status of a *hypothetical judgment creditor*," he does not have a judgment creditor's right to resist the

lien here involved. (Emphasis supplied.) No convincing reasons of policy are advanced for such an interpretation, which departs from the clear language of the statutes involved. Sections 70(c) of the Bankruptcy Act and 6323 (a) of the Internal Revenue Code of 1954, indeed, are both successors to statutes adopted to prevent the evils of secret liens, whether asserted by the United States or other creditors of a bankrupt. *United States* v. *Gilbert Associates, Inc.*, 345 U.S. 361, 363-64, 97 L. Ed. 1071, [fol. 50] 1075 (1953); *Sampsell* v. *Straub*, 194 F. (2) 228, 231 (9th Cir. 1951), *cert. denied*, 343 U. S. 927, 96 L. Ed. 1338 (1952). Accordingly, we are unable to agree that unrationalized concern for federal revenues should lead us to judicially amend a statute which expressly confers on the trustee not *some*, but *all* of the rights of a creditor holding a lien arising from legal proceedings.

Our view is at odds with majority opinions of the Second, Third and Ninth Circuits which have held for the government on the point here involved. *Brust* v. *Sturr*, 237 F. (2) 135 (2nd Cir. 1956); *In re Fidelity Tube Corp.*, 278 F. (2) 776 (3rd Cir. 1960), *cert. denied sub nom. Borough of East Newark* v. *United States*, 364 U. S. 828 (1960); *United States* v. *England*, 226 F. (2) 205 (9th Cir. 1955); *Simonson* v. *Granquist*, 287 F. (2) 489 (9th Cir. 1961), *reversed on other grounds*, 369 U. S. 38 (1962). Notwithstanding our respect for the learned judges of the majority in these cases, we find more persuasive the views expressed by the dissenters in *Fidelity Tube*, 278 F. (2) 782-787, and by Judge Hamley in *Simonson* v. *Granquist*, 287 F. (2) 490-491. We must concede too that our holding here appears to put us also in disagreement with dictum used in our own decision of *In re Taylorcraft Aviation Corp.*, 168 F. (2) 808, 810 (6th Cir. 1948). The dictum in that case was really in the nature of an aside observation because Section 70(c) of the Bankruptcy Act was not involved at all. Judge Allen, in dealing with the priority in bankruptcy of a mechanic's lien over a federal tax lien, *notice of which had been filed*, took occasion to say, "The trustee was not a judgment creditor . . . *and hence § 3672, Title 26, U. S. C.*,

26 U. S. C. A. Int. Rev. Code, § 3672 (predecessor to § 6323 I. R. C., 1954), has no application." (Emphasis supplied.) Our present decision does not conflict with Judge Allen's observation that a trustee in bankruptcy is not a judgment creditor since we rule only that Section 70(c), not considered by Judge Allen, gives him the *rights* of a judgment creditor.

The above decisions, with which we disagree, appear to hold that language employed by the United States Supreme Court in *United States* v. *Gilbert Associates, Inc.*, 345 U.S. 361, 364, 97 L. Ed. 1071, 1075 (1953), requires that we hold for the government. The *Gilbert* case did not deal with the Section 70(c) rights of a trustee in bankruptcy. The opposing claims there involved were based [fol. 51] on a federal tax lien and a tax lien assessed by the Town of Walpole, New Hampshire. The Supreme Court of New Hampshire had given priority to the town tax because of its holding that the assessment of a municipal tax " 'is in the nature of a judgment.' " The United States Supreme Court declined as a matter of federal law to accord the municipal or state taxing authority the status of a judgment creditor within the meaning of the lien statute. In so ruling, the Court said ". . . we think Congress used the words 'judgment creditor' in § 3672 in the usual, conventional sense of a judgment of a court of record, since all states have such courts." We do not feel that this language compelled the holdings of the cases with which we disagree and upon which the government here relies. It is our view that *Gilbert's* holding that a municipal tax creditor is not a "judgment creditor" for purposes of Section 6323(a), regardless of its status under state law, is inapposite to the question now before us. Such view, we believe, is supported by the reasons expounded in Judge Kalodner's dissenting opinion in *In re Fidelity Tube Corp.*, 278 F. (2) 785-86. We agree, too, with the statement of Judge Hamley in *Simonson* v. *Granquist*, 287 F. (2) 491:

> "But the Supreme Court did not say, and had no reason to say, that Congress could not make available to trustees in bankruptcy a defense which it originally made available only to judgment creditors. The defense having been created by Act of Congress, the

same legislative body was free to extend its benefits however it pleased."

We think that Judge Hamley spoke correctly in stating, "In my view this statute (§ 70(c)) states as clearly as words can speak that a trustee is to be treated *as if* he were a judgment creditor, although obviously he is not one." *Ibid.*

An alternative position taken by the government in its brief to this Court is that even though the notice required by Section 6323(a) was not filed prior to bankruptcy, its lien gained priority over the trustee's title to the bankrupt's assets in February, 1961, at which time, it is claimed, a notice thereof was filed with the proper state authority. Reliance is placed on Section 67(b) of the Bankruptcy Act, 11 U.S.C. § 107(b). This contention is first made in the government's brief to this court and was [fol. 52] not presented to or considered in the bankruptcy proceedings or on review by the District Judge. The referee's certificate on review recited that "no notice of federal tax liens for internal revenue taxes was at any time filed in the office of the Recorder of Erie County, Ohio, nor the office of the Clerk of Court for this Judicial District." This was not challenged in the District Court. In his brief here, government counsel states "we have examined the record *in this case* and have found that notice of lien was filed with Carl A. Speir, Recorder, Erie County, Ohio, . . . on February 9, 1961. . . ." (Emphasis supplied.) From our own examination of the record *in this case*, we fail to find that such information constituted any part of the record. It is supplied by attaching to the government's brief a certified copy of a notice, obtained from the Recorder of Erie County on July 15, 1963. This date is after the filing of Notice of Appeal on April 17, 1963, and the filing of the record on appeal in this court on May 23, 1963.

Aside from our surface impression that there is no merit to this position of appellant, we will not consider a matter that was not before the District Court. *In re Frank Fehr Brewing Co.*, 268 F. (2) 170, 183 (6th Cir. 1959), *cert. denied*, 362 U.S. 963 (1960).

Judgment affirmed.

[fol. 53]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JUDGMENT—Filed August 4, 1964

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Approved for entry:

/s/ Clifford O'Sullivan,
United States Circuit Judge

[fol. 55]

[Clerk's Certificate to Foregoing Transcript
Omitted in Printing]

[fol. 57]

SUPREME COURT OF THE UNITED STATES

No. 646, October Term, 1964

UNITED STATES, PETITIONER

vs.

RAY F. SPEERS, Trustee in Bankruptcy of the Kurtz Roofing Company, etc.

ORDER ALLOWING CERTIORARI—January 18, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 762999 579